IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 6437 of 1999
with
SPECIAL CIVIL APPLICATION No. 7844 of 1999
with
SPECIAL CIVIL APPLICATION No. 8022 of 1999
with
CIVIL APPLICATION No. 6167 of 2000
with
CIVIL APPLICATION No. 6437 of 2000
with
SPECIAL CIVIL APPLICATION Nos. 2955 to 2973 of 2002
with
SPECIAL CIVIL APPLICATION No. 200 of 2002
with
SPECIAL CIVIL APPLICATION No. 17164 of 2004
with
CIVIL APPLICATION Nos. 1373 & 1374 of 2005
with
CIVIL APPLICATION No. 8378 of 2003
with
MISC. CIVIL APPLICATION NO.2272 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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NISHITH DHRUVA & 2 - Petitioner(s)

Versus

GUJARAT PUBLIC SERVICE COMMISSION & 1 - Respondent(s)

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Appearance :
1. SCA No.6437 of 1999

MR PARESH UPADHYAY for Petitioner(s) : 1,
MR SK PATEL/ MR HJ TRIVEDI for Respondent.

2. SCA Nos.7844 & 8022 of 1999 & SCA Nos.2955 to 2937 of 2002

MR NK MAJMUDAR for the Petitioners.

MR SK PATEL/ MR HJ TRIVEDI for Respondent No.1

MR PARESH UPADHYAY for Respondent,

MR LB DABHI, AGP for State.

3. SCA No.200 of 2000 & SCA No.17164 of 2004

MR PR NANAVATI for the Petitioner

MR SK PATEL/ MR HJ TRIVEDI for Respondent No.1

4. CA Nos. 6167 & 6437 of 2000

MR PARESH UPADHYAY for Applicant

MR NK MAJMUDAR for Original Petitioner.
MR SK PATEL/ MR HJ TRIVEDI for Original Respondent.

5. CA Nos.1373 & 1374 of 2005

MR SK PATEL/ MR HJ TRIVEDI for Original Applicant.

MR NK MAJMUDAR for Original Petitioners.

6. CA No.8378 of 2003

MR NK MAJMUDAR for Original Applicant.

7. MCA No.2272 of 2003

MR SK PATEL/ MR HJ TRIVEDI for Original Applicant.

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 12/12/2005

COMMON ORAL JUDGMENT

1. Since all these Special Civil Application and Civil Applications are inter connected and

issues raised therein are common, they are being heard together and are being disposed of by this common order and judgment.

2. Special Civil Application No.6437 of 1999 is filed by one Nishith M. Dhruva, praying for the direction to the respondent i.e. Gujarat Public Service Commission to recast the final seniority list dated 24.8.1999, excluding the names of the persons shown at Serial Nos.13, 14, 17, 23, 24, 30, 31, 33, 34, 35 and 53, who did not belong to the cadre of Assistant in the establishment of respondent commission.

3. Special Civil Application No.7844 of 1999 is filed by in all 16 persons praying for quashing and setting aside the final seniority list published on 24.8.1999 for the cadre of Assistant by respondent authorities. The petitioners have also sought for the direction to hear the petitioners and to prepare the

final seniority list afresh.

4. Special Civil Application No.8022 of 1999 is filed by in all 20 petitioners praying for the similar relief of quashing and setting aside the seniority list dated 24.8.1999 in so far as the said seniority list affects the rank and position of the petitioners. They have also sought for the declaration from this Court to the effect that the final seniority list of Assistants dated 4.5.1985 was required to be confirmed and should not have been changed by the commission. Further relief was also sought to the effect that the commission should not be allowed to act upon the said seniority list dated 24.8.1999 and it should act upon the final seniority list as Assistants dated 4.5.1985.

5. Since Special Civil Application No.8422 of 1999 was admitted by the Court and stay against

the operation of the seniority list of 1999 was granted. Mr.Nishith M. Dhruva has moved Civil Application No.6167 of 2000 in Special Civil Application No.8022 of 1999 praying for vacating the ex-parte ad-interim stay granted by this Court on 19.4.2000.

6. Similarly, the said Mr.Dhruva, the petitioner of Special Civil Application No.6437 of 1999 also moved Civil Application No.6265 of 2000 praying for the similar relief of vacating the ex-parte ad-interim stay granted by this Court on 11.10.1999 in Special Civil Application No.7844 of 1999.

7. Special Civil Application No.200 of 2000 is filed by one Mr.Harshad Pratap Pathak, praying for quashing and setting aside the seniority list of Section Officers dated 4.5.1985 and the seniority list of Section Officers dated 25.10.1996, who are proposed to

be promoted as Deputy Secretary on 31.12.2001 and further praying for the direction to the respondents concerned not to give effect of promotion from the post of Section Officer to Deputy Secretary, till petitioner is promoted to the post of Section Officer ahead of Mr.C.R.Vyas, in the seniority list and further selecting him in the post of Deputy Secretary that is contemplated by respondents with effect from 31.12.2001. The petitioner further prayed for the direction to the respondents to immediately promote the petitioner to the post of Section Officer from his present post of Assistant as per the deemed date vide order dated 30.8.2001, as he is senior most in the list of Assistants as on 5.2.1990 on which date his junior Mr.C.R.Vyas was promoted and sought for the further direction to the respondents to consider the petitioner to be promoted to the post of Deputy (Under) Secretary with effect from 31.12.2001.

8. Special Civil Application No.2955 to 2973 of 2002 are filed by the petitioners who are already the petitioners in Special Civil Application No.7844 of 1999 and/or Special Civil Application No.8022 of 1999. These petitions are one page petitions. They are filed pursuant to the direction of this Court to file separate petitions. The relief prayed for in these petitions is same as was prayed for in Special Civil Application No.7844 of 1999 as well as Special Civil Application No.8022 of 1999.

9. Special Civil Application No.17164 of 2004 is filed by Mr.Harshad Pratap Pathak, who is the petitioner in Special Civil Application No.200 of 2002 and prayed for the direction to respondent authorities to promote the petitioner on the post of Deputy Secretary ahead of respondent No.4 – Mr.C.R.Vyas

considering the higher placement of the petitioner in seniority list of the year 1999 and in light of the deemed date granted to the petitioner as well as the guidelines prescribed in Government Resolution dated 18.5.1999 and 16.11.1989.

10. Civil Application Nos.1373 and 1374 of 2005 are filed by Gujarat Public Service Commission in Special Civil Application No.8022 of 1999 and Special Civil Application No.7844 of 1999 respectively seeking permission from this Court to fill up the post of Section Officers by operating Seniority list of Deputy Section Officers dated 24.8.1999.

11. Civil Application No.8378 of 2003 is filed by one Smt.Ritaben Bhupendrabhai Dave -original petitioner No.8 in Special Civil Application No.8022 of 1999 seeking direction to the respondent authorities to comply with

the interim order dated 18.9.2003 passed in the Civil Application No.5086 of 2003 directing the Gujarat Public Service Commission to fill up all the 7 posts of Section Officer and seeking further direction to Gujarat Public Service Commission to consider the case of the present applicant for promotion to the post of Section Officer, as per the order dated 18.9.2003 passed by this Court.

12. M.C.A. No.2272 of 2003 is filed by the GPSC seeking modification in the order passed by this Court in Civil Application No.5086 of 2003 in S.C.A. No.7844 of 1999 dated 18.9.2003 to the effect that instead of seven posts of Section Officer, Class-II six posts of Section Officer, Class-II are required to be filled up by the applicant to the aforesaid extent.

13.So far as Special Civil Application Nos.7844, 8022 of 1999 and Special Civil Application

Nos.2955 to 2973 of 2002 are concerned, there is a common challenge to the final seniority list dated 24.8.1999. Mr.Nirav K. Majmudar, learned advocate appeared on behalf of all the petitioners in these petitions. It is the case of the petitioners that the seniority list of Assistants working in the office of the respondent commission, from Serial Nos.1 to 65 was finalised on 4.5.1985, as per the government orders and the ratio prescribed by the Recruitment Rules. The said list was not challenged nor was a subject matter of any proceeding and was fully acted upon from 1985 to 1997 and some of the petitioners not only earned promotions once but twice to higher posts as can be seen from the materials produced on record. On 17.12.1997, a provisional seniority list of Assistants working from Serial Nos.66 to 125 as on 1.1.1995 was published. However, most of the petitioners were not required to file their

objections as their rank was already finalised under the seniority list dated 4.5.1985. One Mr.N.M.Dhruva filed a petition being S.C.A. No.10548 of 1998, joining only the GPSC as party and obtained direction from this Court on 26.2.1999 to finalise the said list i.e., provisional list of 17.12.1997. On 13.4.1999, another provisional list of all Assistants working in the commission was issued on the assumption that there was such a direction to revise the earlier list and the petitioners were pushed down and the direct recruits were pushed up. On 24.8.1999, final seniority list was published on the basis of the objections raised by some persons and without giving due notice to the petitioners. Challenging the said seniority list, Special Civil Application No.7844 of 1999 was filed by Mr.S.A.Shaikh and 15 others and obtained interim order. Thereafter, on 11.10.1999 Special Civil Application No.8022 of 1999 was filed by one

Mr.C.B.Kapadia and 19 others. This petition was admitted on 19.4.2000 and there was an order to file one page separate petition for each of the petitioners. Accordingly, Special Civil Application Nos.2955 to 2973 of 2002 was filed in April, 2002.

14. During the pendency of these petitions, some of the petitioners, namely, Mr.C.B.Kapadia, Mr.C.R.Bihola, Mr.N.R.Pandya, Mr.M.H.Rasalawala and Smt.R.B.Dave, have retired from service and they were, therefore, not interested in prosecuting the respective petitions. So far as remaining petitioners are concerned, Mr.Majmudar has raised following contentions :-

(i) there was no challenge to the seniority list dated 4.5.1985 from 1985 to 1997.

(ii) there was no direction to disturb the seniority already finalised and acted upon by the Government or by this Court in its order

dated 26.2.1999 passed in Special Civil Application No.10548 of 1998.

(iii) the said list of 1985 was not only acted upon but some of them were promoted to the higher posts.

(iv) the statements made in the provisional list of 13.4.1999 and in the final seniority list of 24.8.1999 are not consistent with the rules of Assistants prevalent in the State and/or otherwise are made illegally and in breach of the principles of natural justice.

15. Further contention was raised that the said seniority list dated 24.8.1999 fixing the seniority of Assistants is against the Government Resolutions issued from time to time in the matter of fixation of seniority in the cadre of Assistants and against the principles fully recognised by the Apex Court that the direct recruits cannot be pushed up so as to get the seniority from the dates other than the

dates of actual appointment as direct recruits in that cadre. The said final seniority list was prepared without taking into consideration the objections raised by some of the petitioners in the representations. It is, therefore, contended that the said seniority list is illegal and improper and also unreasonable. It is further contended that the said seniority list is otherwise illegal in as much as the respondent No.1 Board has recalculated the number of posts of Assistants from 1.5.1960 and, therefore, the petitioners whose seniority ranks were finalised in 1985 even though they were regularly promoted were entitled to the benefit of continuous officiation in the post of Assistants and on promotional post and even though no details were given as to how the earlier calculation of number of posts was defective and why such an exercise was required to be undertaken by the commission after lapse of about 14 years and,

therefore, the petitioners would face adverse consequences if the said seniority was now allowed to be operated so as to nullify the final seniority list of 1985.

16. In the aforesaid petition, since an exparte ad-interim relief was granted by this Court against the operation of seniority list of 1999, the person affected by the said order, namely, Mr. Nishith M. Dhruva, has filed Civil Application No.6167 of 2000 for joining as party in Special Civil Application No.8022 of 1999. The said application was granted by this Court and said applicant was allowed to be joined as party. Thereafter, the said Mr.Dhruva had filed another Civil Application No.6265 of 2000 praying for vacating ad-interim relief granted in Special Civil Application No.7844 of 1999. The said application was ordered to be heard alongwith the main petition.

17. Mr.Paresh Upadhyay, learned advocate appearing for Mr.Dhruva has raised several contentions opposing to grant any of the prayers made by the petitioners of Special Civil Application No.7844 of 1999 and 8022 of 1999. He has given the entire background leading to present controversy. He has submitted that in the office of the Gujarat Public Service Commission, seniority list for the cadre of Assistants (Deputy Section Officers) was not finalised for about 14 years and, therefore, applicant has filed petition being Special Civil Application No.10548 of 1998 wherein this Court has passed an order on 26.2.1999 directing the respondent commission to prepare and publish final seniority list of the Assistants within a period of six months. Pursuant to the said order the authorities of the Gujarat Public Service Commission, published the provisional list on 13.4.1999

and invited objections. After considering the objections raised, on 24.8.1999 a final seniority list was published by the office of Gujarat Public Service Commission and this seniority list is the subject matter of challenge in Special Civil Application No.7844 of 1999 and Special Civil Application No.8022 of 1999. He has further submitted that the grievance of Mr.Dhruva was substantially redressed by the said seniority list of 24.8.1999. Only exception was that about 11 persons who were not in the establishment of Gujarat Public Service Commission were wrongly shown in the said seniority list. He has, therefore, filed Special Civil Application No.6437 of 1999, which was admitted and is also heard alongwith this group.

18. Mr.Upadhyay has further submitted that in the office of the Gujarat Public Service Commission, the employees working in the cadre

of Assistants by way of promotion were in majority and they were in charge of the establishment branch of the office all through out. He has further submitted that as soon as the seniority list was finally published in the month of August, 1999, a submission was made from the concerned branch that the final seniority list may be implemented, however, the concerned Joint Secretary had given an order in writing to the effect that the said exercise may be deferred for about two months. He has further submitted that by this time, all employees working in the office of the Gujarat Public Service Commission, whose status in the cadre of Assistants were of promotees, including the person who gave orders to defer the implementation of the seniority list, formed a group and filed two different Special Civil Application No.7844 of 1999 and Special Civil Application No.8022 of 1999. These two petitions were filed in the month of October,

1999, and out of these two petitions, Special Civil Application No.7844 of 1999 was circulated for hearing on 11.10.1999 and an ex-parte ad-interim order was passed by this Court. He has further submitted that the said order has never been confirmed after hearing either Gujarat Public Service Commission or even other respondents.

19. Mr.Upadhyay further submitted that though the seniority list finally published by the authorities of Gujarat Public Service Commission was ex-parte stayed by this Court as back as on 11.10.1999, the authorities of Gujarat Public Service Commission have neither cared to file affidavit in reply in the said petition nor have they chosen to file any Civil Application for vacation / modification of the stay order granted by this Court on 11.10.1999 for quite some time. He has further submitted that the only reason that can be presumed is

that the persons who have to take decision in the establishment channel of the Gujarat Public Service Commission were themselves petitioners before this Court and they were enjoying the stay order granted by this Court. He has further submitted that one of the petitioners, namely, Mr.C.B.Kapadia, in Special Civil Application No.8022 of 1999 was Joint Secretary and was looking after establishment matters of the respondent commission. He was also In-charge Secretary, Gujarat Public Service Commission for the considerable period. He has, therefore, submitted that it was only because of this reason no further application was moved before this Court for vacating ex-parte ad-interim order granted by this Court.

20. Mr.Upadhyay has further submitted that in Special Civil Application No.6437 of 1999 though a very short point was raised as to why the persons who were, even according to Gujarat

Public Service Commission, repatriated to the State Government were shown in the seniority list, the said petition was contested by tooth and nail. Not only that even the orders of this Court dated 31.12.1999 and 5.5.2000 were not complied with by the authorities. Mr.Upadhyay further submitted that the seniority list dated 24.8.1999 clearly states that the said seniority list was published after considering the objections received pursuant to the provisional list dated 13.4.1999, and after considering the Government Resolution, Notification and the contentions raised by Mr.Dhruva, the petitioner in Special Civil Application No.10548 of 1998 and the final order of this Court passed in the said matter.

21. As far as Special Civil Application No.6437 of 1999 is concerned, the main grievance raised by the petitioner was that the respondent authorities were not publishing the

final seniority lists and were acting arbitrary in the matter of fixation and publication of seniority lists. Pursuant to the order passed by this Court, on 26.2.1999, the final seniority list was published by the respondent on 24.8.1999, for the cadre of Assistant (Deputy Section Officer). However, for the reason best known to them, the respondent authorities have arbitrarily included persons repatriated to State Government at Serial Nos.13, 14, 17, 23, 24, 30, 31, 33, 34, 35 and 53. These persons were not part of the establishment of the respondent commission and were repatriated to Sachivalaya. He has further submitted that inclusion of these persons in the seniority list was arbitrary and that has caused prejudice to Mr.Dhruva by at least 27 ranks in the seniority positions. In the final seniority list of 24.8.1999, the ratio of direct recruits, promotees and semi direct recruits, fixed for different periods

was indicated. From 1.5.1960 to 14.8.1969, the ratio between direct recruits and promotees was 3:1. From 15.8.1969 to 8.5.1977, this ratio was 2:1. From 9.5.1977 to 15.2.1978, the ratio between direct recruits, promotees and semi direct recruits was 3:2:1, whereas, from 16.2.1978 to 31.12.1998, it was 1:1:1. If the persons falling in the category of direct recruits and repatriated to Sachivalaya were excluded, the placement of Mr.Dhruva would have been much ahead of those persons who have taken advantage of such inclusion. He has further submitted that the exclusion of persons would lead to a situation, where Mr.Dhruva would immediately be required to be considered for promotion on the post of Section Officer, that too, with deemed date, for which the respondent authorities were not ready and just to avoid that situation, the respondent authorities have dragged Mr.Dhruva in one more litigation. On the basis of material produced before the Court

and the seniority list of Assistants in Government, Mr.Upadhyay has demonstrated that these very persons were considered while preparing the seniority list of Government Servants and, hence these persons should be excluded from the final seniority list prepared by the respondent commission.

22. This petition was opposed by the respondent commission and affidavit in reply was filed on behalf of the respondent commission. Mr.S.K.Patel and Mr.Trivedi, the learned advocate for the Commission have submitted that all these persons were initially appointed by the respondent commission. It was further contended that all these persons were regularly appointed by the Commission from the beginning of their career. These persons were directly allotted to the commission and they have started career as Assistants in the commission. Hence, there is no question of

their repatriation to the Government. All these persons, not only served in the commission but they have also been promoted from Assistants to Section Officers or Accounts Officers, on the basis of their seniority in the commission. It was further contended in the affidavit in reply that once candidates joined the service in Gujarat Public Service Commission as Assistants their respective source of recruitment was taken as basis irrespective of the fact as to whether such candidates have subsequently left services of commission and hence the petition filed by the petitioner should not be entertained.

23. In rejoinder to these submissions made on behalf of the commission, Mr.Upadhyay has submitted that the commission has completely ignored the fact that all these persons were shown in the seniority list in Sachivalaya right from the initial date of appointment and

they were accordingly given promotion also on the post of Under Secretary as well as well as Deputy Secretary, in Sachivalaya. He has further submitted that few of these persons have retired also after enjoying seniority and consequential benefits of promotion etc., in Sachivalaya on the strength of said seniority. Mr.Upadhyay has further submitted that somewhere in February, 1995, the commission wrote a letter to the Government that these persons who were in commission and who wanted to opt for Sachivalaya cadre, could be considered on the establishment of Sachivalaya and they would continue to work with the commission on deputation basis and the tenure of such deputation would be at the discretion of commission. It was also specified in the said letter that such persons would not be entitled to any promotion in commission. Mr.Upadhyay has further submitted that this factor was either completely ignored or might

deliberately be suppressed from this Court, just to defeat the legitimate claim of Mr.Dhruva. He has, therefore, submitted that the relief claimed by Mr.Dhruva in his petition seeking exclusion of these persons from the seniority list dated 24.8.1999, deserves to be granted.

24. As stated earlier during the pendency of the aforesaid petition, two more petitions were filed by Shri Pathak being Special Civil Application No.200 of 2002 and Special Civil Application No.17164 of 2004. Mr.P.R.Nanavati, learned advocate is appearing on behalf of the petitioners in both these petitions. As far as Special Civil Application No.200 of 2002 is concerned, the main grievance of the petitioner was that one Mr.C.R.Vyas, was promoted to the post of Section Officer on 5.2.1990 on the basis of quota & rota policy adopted by the commission. However, at that time the

Government did not come out clearly with the promotional policy which has been subsequently clarified by the Government vide its G.R., dated 18.5.1999 and on the basis of which concerned respondents have revised the seniority list with effect from 30.11.2000 vide circular dated 30.11.2000. It is further contended that the petitioners have made various representations to the various authorities, but they were not considered. When this petition was pending, the respondent commission has filed Civil Application No.5083 of 2003 seeking certain interim directions. While disposing of the said Civil Application, this Court has passed an order on 18.9.2003, modifying the ad-interim relief granted vide order dated 11.10.1999 to the extent that GPSC would fill up seven posts for the cadre of Section Officer according to the seniority list dated 24.8.1999 without prejudice to the rights and contentions of all the respective parties

with clear understanding that the persons who might be promoted on said seven posts, could not get any equity on account of the order of promotion that might be issued by the commission in their favour and they shall not claim any right on account of such promotion orders. The Court has also directed the seven persons getting promotion on the post of Section Officer pursuant to the interim arrangement based on the said order to file an undertaking before this Court. The Court has also made it very clear that the said order was passed without expressing any opinion on merits of the matter and without considering the subject matters pending before this Court. By virtue of the said order grievance of Mr.Pathak was redressed to some extent.

25. The said petitioner i.e., Mr.H.P.Pathak, has filed another petition in Special Civil Application No.17164 of 2004 raising grievance

that the directions issued by the Court were not complied with by the respondent commission. The said petition was ordered to be heard alongwith other group petitions.

26. From the perusal of the different applications and petitions filed by the different contesting parties, it appears to the Court that the grievance raised therein centers round the one and only one issue, namely, seniority list dated 24.8.1999 should be given effect to or not. The persons who have taken advantage of seniority list of 1985 have opposed the seniority list of 1999, mainly on the ground of delay, latches and acquiescence. It is contended that the 1985 seniority list has already been implemented and given effect to. As against this, Mr.S.K.Patel and Mr.Trivedi representing the respondent commission, Mr.P.R.Nanavati and Mr.Paresh Upadhyay have canvassed their arguments in

support of implementation of the seniority list of 1999. As can be seen from the earlier discussion that there was government policy to publish the seniority list at the interval of every two years. The seniority list was finalised in the year 1985 and, thereafter, for 14 years no seniority list was finalised. Promotions were given only on the basis of seniority list of 1985. Several representations were made, which were not considered and ultimately petition was filed before this Court praying to issue direction to finalise the seniority list. This exercise was ultimately resulted into final seniority list of 1999. The Court, therefore, found substance in the submission of Mr.Upadhyay that challenge made to the seniority list of 1999 merely on the ground of delay, latches and acquiescence cannot be entertained. To make good his submissions, he relied on several authorities of the Hon'ble Supreme Court and emphatically

submitted that the seniority list of 1999 is required to be implemented and challenge made to the said seniority list should not be entertained or accepted by this Court.

27. Mr.Upadhyay relied on the decision of Hon'ble Supreme Court **in the case of M.Subba Reddy and another vs. A.P.State Road Transport Corporation and others, reported in AIR 2004 Supreme Court 3517**, wherein appellant promotees were regularisd and confirmed before direct recruits were appointed. In view of an inbuilt rota rule contained in Regn.3 of Recruitment Regulations, placing them below direct recruits in seniority list, was held to be not invalid. The Court has held that the plea of appellants that they were regularised when no direct recruits were available and, therefore, direct recruits subsequently appointed cannot scale over them in seniority list, was not tenable. The Court further held

that when there is fixed quota between two sources of recruitment, there is no discretion with the Corporation to alter the quota or to deviate from the quota.

28. Reliance was placed on the decision of Hon'ble Supreme Court **in the case of Kuldip Chand, vs. Union of India and others, reported in AIR 1996 Supreme Court, 706**, for the proposition that mere rejection of representation does not disentitle the aggrieved person of claiming his seniority over the persons who have taken advantage under the seniority list of 1985. The Hon'ble Supreme Court has held that despite there being considerable delay, the claim of seniority cannot be rejected merely on that ground. The Court further held that the mere fact that he did not challenge the seniority list, which was illegally prepared, till he was aggrieved for non consideration of the claim to the post of

accountant, his legitimate right to be considered cannot be denied. The Court, therefore, took the view that the delay is of no consequence for considering the claim of the aggrieved person for the post of accountant.

29. Reliance is placed on the decision of Hon'ble Supreme Court **in the case of G.P.Doval and others vs., Chief Secretary, Govt. of U.P., and others, reported in AIR 1984 Supreme Court 1527**, wherein the Hon'ble Supreme Court observed that service rules will have to be reasonable, fair and not grossly unjust if they are to survive the test of Articles 14 and 16. It is thus well settled that where officiating appointment is followed by confirmation unless a contrary rule is shown, the service rendered as officiating appointment cannot be ignored for reckoning length of continuous officiation for determining the place in the seniority list. The Court further observed that in that

case grievance was made that the petitioner have moved the Court after a long unexplained delay and the Court should not grant any relief to them. It was pointed out that the provisional seniority list was drawn up on March, 22, 1971 and the petitions have been filed in the year 1983. The respondents therefore submitted that the Court should throw out the petitions on the ground of delay, latches and acquiescence. It was stated that promotions granted on the basis of impugned seniority list were not questioned by the petitioners and they have acquiesced into it. The Court has not acceded the request because respondents 1 to 3 have not finalised the seniority list for a period of more than 12 years and are operating the same for further promotion to the utter disadvantage of the petitioners. Petitioners went on making representations after representations which did not yield any response, reply or relief. The

Court, therefore, allowed the petition and quashed the seniority list dated 22.3.1971 and directed the respondent authority to draw up a fresh seniority list based on the principle of length of continuous officiation reckoned from the date of first appointment if the appointment is followed by confirmation i.e., selection / approval by the State Public Service Commission. Having placed reliance on this decision Mr.Upadhyay strongly urged that his case is on stronger footing in this wise that the respondent Commission has itself prepared fresh seniority list and challenge to the said seniority list is made by Mr.Majmudar on the ground of such delay and latches. He has, therefore, submitted that this decision is a clear answer to the issue raised by Mr.Majmudar in Special Civil Application No.7844 of 1999 and Special Civil Application No.8022 of 1999.

30. Further reliance is placed on the decision of Hon'ble Supreme Court **in the case of A.N.Sehgal and others vs. Raje Ram Sheoram and others, reported in AIR 1991 Supreme Court 1406**, wherein while considering the relevant provisions contained in Haryana Service of Engineers, Class-I, P.W.D. (Roads and Buildings) Rules (1960), the Court observed that it cannot be said that the seniority as Executive Engineer is to be counted from the date of initial temporary promotion as it would allow the promotees to occupy 100% posts of Executive Engineers, Superintending and Chief Engineers leaving little room for Rule 5(2)(a) to operate to full force. The exception would eat away the flesh and blood of Rule.5(2)(a) freezing the channel of promotion to the direct recruits to senior posts for a very long time to come. In the absence of rule of rotation there may be no chance to a direct recruits to occupy the senior posts. That does not appear

to be intendment, scope and operation of the proviso. The intendment appears to be that so long as the direct recruit Asstt. Executive Engineer eligible and considered fit for promotion is not available, the promotee from Class-II service in excess of the quota is eligible to occupy on officiating capacity the senior posts, i.e., Executive Engineers and above. The moment direct recruits are available, they alone are entitled to occupy 50% of their quota posts and the promotees shall give place to the direct recruits.

31. Reliance is placed on the decision of Hon'ble Supreme Court **in the case of V.S.Thomas and another vs. B. Muraleedharan and others, reported in AIR 1998 Supreme Court 3136**, wherein the direct recruits were appointed as probationers after successfully completion of training. The promotees were appointed long prior to the appointments of the above said

direct recruits. But the point is that they were not appointed in accordance with the rules in the sense that they were not appointed against the permanent vacancies intended for recruits by transfer. They were all appointed temporarily as a stop-gap arrangement. The Court, therefore, held that the promotees cannot therefore claim seniority over the direct recruits. The Court, therefore, held that any appointment / regulation contrary to the rules, which would be prejudice the rights of direct recruits, cannot be sustained.

32. Reliance is placed on the decision of Hon'ble Supreme Court **in the case of State of Maharashtra and another vs., Vasant Krishnaji Chavan and others, reported in AIR 2000 Supreme Court 622**, wherein while rejecting the contention raised on behalf of the appellants that some of the appellants have put in more than 17 years of service when few of the direct

recruits were either schooling and/or not born in the cadre and if the appellants were to be pushed down, it will cause a great hardship to them. The Hon'ble Supreme Court observed that if there is patent violation of the quota rule, the result must follow and the appellants who remained in the office for all these years cannot take the advantage of this situation. The Court has, therefore, rejected the submission as devoid of any substance.

33. One of the contentions raised by Mr.Upadhyay was that the names of some of the petitioners were not there in the seniority list of 1985 and still they have stated that their names are included in the said list. They have, therefore, suppressed material facts and obtained order in their favour. It was, therefore, contended that while dismissing their petitions, the Court should award heavy compensatory cost to the petitioner. In

support of this proposition reliance was placed **on the decision of Salem Advocate Bar Association, T.N. vs. Union Of India, reported in (2005) 6 Supreme Court Cases 344**, wherein the Hon'ble Supreme Court observed that judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are against the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In a large number of cases, such an order is passed despite Section 35(2) C.P.C. Such a practice also encourages the filing of frivolous suits. It also leads to the taking up of frivolous defences. Further, wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for costs to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party

except in those cases where the Court in its discretion may direct otherwise by recording reasons therefor.

34. Considering the entire factual matrix and the legal authorities cited before the Court and after having heard the learned advocates appearing for the respective parties and taking note of their pleadings as contended in the petitions, applications and after taking into consideration the documents, resolutions, circulars, notifications etc., produced before the Court and two seniority lists which are under consideration before the Court, the Court is of the view that the challenge made to the final seniority list of 1999 is not sustainable and while preparing the said final seniority list, the respondent commission has taken into consideration all the aspects of the matter. The commission has itself come forward with the case that there were certain defects and

irregularities in the seniority list of 1985, that circulars were taken into consideration, injustice has been done to many persons and the policy of the government has not been followed. Seniority list was not finalised at the interval of 2 years and more than 14 years have passed. Weighing with this submission it is difficult to accept the challenge made to the seniority list of 1999.

35.In the above view of the matter, Special Civil Applications Nos.7499/1999, 8022/1999 and 2955 to 2973 of 2002 are hereby dismissed. While dismissing all these petitions, the Court makes it clear that all promotions which have been given until now on the basis of the seniority list of 1985 should not be disturbed nor those persons should be reverted. It is also made clear that injustice which has been done to the persons who have found placement in the seniority list in the year 1999 and who have

not been promoted by virtue of the operation and implementation of the seniority list of 1985 till this date, they will be given deemed date of promotion and their seniority as Assistants would be counted for all future promotions. It is also made clear that no monetary benefit upto this date, which otherwise would have accrued, should be given to them pursuant to the implementation of the seniority list of 1999. As a matter of fact, this concession was also given by the learned advocate Mr.Upadhyay as well as Mr.Nanavati during the course of argument, with the consent of their clients. Since Mr.Nanavati has virtually adopted arguments of Mr.Upadhyay and submitted that his grievance would be redressed if the seniority list of 1999 is upheld and hence these two petitions are accordingly disposed off. Since Mr.Pathak was promoted to the post of Section Officer during the pendency of S.C.A. No.200 of 2002, the grievance raised

therein, virtually stands redressed. Moreover, as per the view taken by the Court, for any future promotion, the seniority of Assistants as per the revised seniority list of 24.8.1999 will prevail and hence Mr.Pathak will get priority over Mr.Vyas for the promotion of Deputy Secretary. Thus, S.C.A. No.17164 of 2004 stands allowed to this extent. Special Civil Application No.6437 of 1999 wherein directions are sought for from this Court to the respondent commission to exclude the names of persons who are already repatriated to the State Government and their seniority is counted there, is hereby allowed. The respondent commission is, therefore, directed to give effect of revised seniority list of 1999 after excluding the names of those persons who were repatriated. Revised list is already placed on record, pursuant to the direction given by this Court and, hence this revised list is hereby ordered to be given effect to.

36. As far as cost aspect is concerned, the Court is of the view that initially two petitions were filed on behalf of all the petitioners, namely, Special Civil Application No.7844 of 1999 and Special Civil Application No.8022 of 1999. Pursuant to the direction of this Court, separate petitions were filed and while filing these separate petitions certain averments commonly made, were lost sight of. It is incumbent upon the petitioners to place correct facts before the Court, before obtaining any order. However, looking to the facts and circumstances there does not seem to be any malafide intention and hence no cost is awarded.

37. Accordingly, Special Civil Application No.7844 of 1999, Special Civil Application No.8022 of 1999 and Special Civil Application Nos.2955 to 2973 of 2002 are hereby dismissed.

Special Civil Application No.200 of 2002 and Special Civil Application No.17164 of 2004 are hereby allowed to the aforesaid extent and Special Civil Application No.6437 of 1999 is allowed to the aforesaid extent.

38. In view of the disposal of the main petition respective Civil Applications and Misc.Civil Application preferred in the main petitions, no longer survive and they are accordingly disposed off.

39. The respondent commission is hereby directed to give effect to this order as expeditiously as possible and in any case, not later than one month from the date of receipt of writ or from the date of receipt of certified copy, which ever is earlier. If there is any ambiguity or difficulty and if need so arises, it is open for the respondent commission to approach this Court for

clarification and/or for extension of time.

kks (K. A. PUJ, J.)